INVESTIGATION REPORT

ENFORCEMENT ACTION ON UNAUTHORISED BUILDING WORKS IN NEW TERRITORIES EXEMPTED HOUSES

August 2004

Office of The Ombudsman

Hong Kong

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ANNEXES

EXECUTIVE SUMMARY

Investigation Report

Enforcement Action on UBWs in NTEHs

UBWs in NTEHs

1. The Buildings Ordinance ("BO") prescribes that all building works require the prior approval of the Buildings Department ("BD") as the Building Authority. However, in the New Territories ("NT"), construction of village-type houses may be exempted from part of the BO subject to their meeting the development conditions and specifications set out in the land lease and the Buildings Ordinance (Application to the New Territories) Ordinance ("BO (NT) O"). These New Territories exempted houses ("NTEHs"), commonly dubbed "small houses", should have not more than three storeys nor exceed a height of 8.23 m (27 ft.), and their maximum roofed-over area should normally not exceed 65.03 sq. m (700 sq. ft.). The Lands Department ("Lands D") is the approving authority for NTEHs.

2. Unauthorised building works ("UBWs") are building works that have not been approved by BD or Lands D, as appropriate. Common examples of UBWs in NTEHs are rooftop structures, canopies, enclosed balconies, ground floor extensions and additional storeys. The most serious are entire buildings constructed without approval. UBWs in NTEHs are a long existing problem.

1996 Direct Investigation

3. In 1996, The Ombudsman conducted a direct investigation and concluded that insufficient resources and low priority accorded to lease enforcement had resulted in the proliferation of UBWs in NTEHs. Recommendations were made to Lands D and the then Planning, Environment and Lands Branch for more effective enforcement. Regrettably little progress has been made in implementation. As there are signs that the problem has deteriorated, The Ombudsman decided in

November 2003 to conduct a second direct investigation into enforcement against UBWs in NTEHs.

2003/04 Direct Investigation

4. This investigation tracks the development since 1996 and examines the factors contributing to the continued proliferation of UBWs in NTEHs. We also study the appropriateness and effectiveness of the enforcement measures so far taken by Lands D and BD.

Development since 1996

5. The 1996 investigation report recommended that Government should:

(a) accurately assess the problem through a sampling survey;

(b) review its priority for lease enforcement action;

(c) consider the need for additional resources;

(d) explore alternatives to lease enforcement action; and

(e) step up publicity on its position regarding UBWs in NTEHs.

6 To date, little has been done to implement these recommendations, due to a combination of factors. It is mainly insufficient resources and lack of a positive attitude or focus on the problem.

Magnitude of Problem

7. Lands D considers the problem to be serious in five out of the nine NT districts. As at the end of 2003, Lands D has detected 6,575 UBWs in NT.

However, the problem is far more serious than that. For example, District Lands Office ("DLO")/Tuen Mun found from a survey in 2003 that the number of detected UBWs was five times that in 2001. On average, there are about 500 complaints on UBWs in NTEHs each year but due to resource constraints, Lands D could act on only about half of them. DLOs also estimated that it would take them years (e.g. 50 and 97 years for two districts) to complete action on existing UBWs.

Policy and Purview

8. Both BD and Lands D have a responsibility to tackle UBWs. BD's prime concern, under the BO, is building safety and so its efforts focus on multi-storey buildings in the urban area. Under its enforcement policy revised by Government in April 2001, BD gives priority to tackling new UBWs, especially those under construction (works-in-progress or "WIP" cases) and UBWs causing imminent danger to life and property. Lands D, as the land administrator, has the responsibility to ensure that land leases are complied with. UBWs in NTEHs are in breach of lease conditions, necessitating lease enforcement action by Lands D. However, due to resource constraints, Lands D gives higher priority to action against misuse of residential buildings for dangerous industrial undertakings than UBWs in NTEHs.

Authority and Organization

9. The BO empowers BD to issue statutory orders requiring owners to remove any illegal or dangerous structures within a stipulated period and to prosecute them for the UBWs and non-compliance with removal orders. Under the Land (Miscellaneous Provisions) Ordinance and the Government Rights (Re-entry and Vesting Remedies) Ordinance, Lands D staff can enter premises for inspection, demolish UBWs, re-enter the land and cancel the lease.

10. BD has a Special Action Unit responsible for tackling reported WIP cases. Enforcement action is carried out by professional consultants on contract to BD.

The lease enforcement teams of DLOs in Lands D are responsible for taking lease enforcement action against UBWs, including UBWs in NTEHs.

Enforcement Strategy

11. In 2001, an internal working group was set up by the Housing Planning and Lands Bureau ("HPLB") with representatives from Lands D and BD to map out a strategy to contain UBWs. The strategy is as follows:

(a) BD
to take priority action against UBWs in NTEHs that are under construction, i.e. WIPs; and

(b) Lands D

(i) to take priority action against cases of blatant breach;

(ii) to tolerate minor breach subject to payment of a penalty premium by the owners, and

(ii) to take lease enforcement action in all other cases according to DLOs' lease enforcement programmes.

WIP Operations

12. BD takes action against WIPs, helped by DLOs in the detection of WIPs and provision of relevant data. For confirmed WIP cases, BD will issue warnings and then statutory removal orders, followed by prosecution for non-compliance. For new UBWs already completed, BD refers them back to Lands D for action. Premature cases, which BD cannot confirm as WIP cases, will be recorded for follow-up inspections within four to six weeks.

13. Between February 2002 to June 2004, Lands D referred 570 cases to BD

resulting in the issue of 108 removal orders, with 21 complied with. BD is following on another 146 cases. Some 200 cases considered as "new UBWs" by BD has been returned to Lands D for which the Department does not have the resources for priority action. Hence, no action has been taken on these 200 cases.

Action against Blatant Breach

14. DLOs may take re-entry action on blatant breach cases. The lease enforcement team first issues a warning to the owner, requiring purge (i.e. removal) of the UBW within 28 days. The grace period could be extended up to six months subject to payment of a forbearance fee. If the UBW is still not removed, DLO will notify the owner of its impending re-entry action and then register the re-entry documents with the Land Registry, cancelling the land lease. The land will become Government land. Legal advice is necessary in every step of the re-entry process. The ex-owner could appeal against the re-entry action within the following six months. There had been two re-entry cases in the last four years. Lands D is taking re-entry action on three cases.

Toleration of Minor Breach

15. Minor breach refers to slight deviations from the development specifications, e.g. marginally exceeding the height or area restrictions. Subject to the payment of a penalty premium by the owner, Lands D may tolerate a minor breach for the life of the house. In each of the past four years, about 53 cases were tolerated, for which penalty premium of around $770,000 was collected.

Lease Enforcement Programmes

16. These are DLOs' schedules for action against selected villages. The lease enforcement team patrols the village to detect UBWs. An advisory letter specifying the breach of the lease conditions will be issued to the owner concerned requesting purge of the UBW, failing which the letter will be registered against the property title at the Land Registry. Monitoring of purged cases will continue with periodic inspections in the following 12 months. Due to shortage of staff, recurrent breach detected after the monitoring period is not acted on immediately. Between

December 1998 and December 2003, about 2000 advisory letters were issued, with some 947 unpurged cases registered with the Land Registry.

17. In the early 1990s, Lands D engaged term contractors to carry out demolition to cope with cases of persistent breach. However in recent years, the shortage of funds, manpower and technical expertise (including support from other departments) has limited Lands D's demolition action.

Rates Exemption for Indigenous Villagers

18. The Home Affairs Department ("HAD") has the authority to grant rates exemption to indigenous villagers subject to their meeting certain criteria, one of which requires the house to be UBW-free, and applicants are required to make a declaration on this. Theoretically, this can help to curb the growth of UBWs. HAD relies on Lands D to conduct spot checks to ensure that the exempted properties remain UBW-free. If a UBW is detected, the owner will be required to clear it, failing which the rates exemption will be withdrawn. From 1997 to the end of 2003, Lands D conducted 851 site inspections and identified 131 cases of UBWs, resulting in the withdrawal of rates exemption in 29 cases.

Problems in Enforcement

Resource Constraints

19. Lands D's lease enforcement teams have remained small in number, resulting in follow-up action not being taken against UBWs not purged and recurrent breach. BD's assistance was necessary in action against WIPs. The delineation of responsibilities between Lands D and BD is not conducive to greater cooperation and can result in buck-passing between the two departments. See paragraphs 27 and 28(a) below.

Proof of Breach of Lease Conditions

20. Gathering proof of breach of lease conditions may not be straightforward as

some leases are decades old and conditions not clearly set out. In some cases, records are missing or boundaries inaccurate. Legal advice is often necessary. DLOs sometimes have difficulties in gaining entry into premises for investigation.

Owners and Villagers Attitude

21 Many owners are reluctant to clear their UBWs and challenge enforcement action. Some villagers think that they can construct their own houses without approval from the authorities. DLOs' enforcement action is often seen as infringement on villagers' rights. Straightforward enforcement issues can become politicised.

Unauthorised Developments on Old Schedule Lots

22. Some villagers have built or redeveloped four or five-storey houses on old schedule lots without approval from the authorities. As the villagers have not sought exemption, Lands D considers the houses to be outside the parameters of NTEHs and in breach of the BO. Such cases are referred to BD for action. However, BD is unable to give them priority. As a result, the number continues to grow and enforcement action becomes increasingly difficult with the passing years.

Organisation Culture

23. Lands D has always taken a low-key and non-confrontational approach to enforcement as it is wary of getting involved in disputes over villagers' rights and village politics. Some owners can take advantage of this to stall or delay enforcement action. Lease enforcement teams have to spend much time and efforts in liaison with owners for clearance of UBWs, very often to no avail.

Follow-up Action

24. The average success rate of enforcement action in the past few years was less than 50%. For many districts, lease enforcement action stops upon the registration of advisory letters with the Land Registry. Such registration (see paragraph 16) has therefore been building up over the years.

25. A UBW can be re-erected, sometimes almost immediately after clearance. More often than not, DLOs do not act immediately on such recurrent breach, resulting in a waste of earlier efforts.

Inconsistent Practices among DLOs

26. Each DLO has the authority to decide on its own lease enforcement action, resulting in different practices. For instance, DLO/Sai Kung initiates re-entry action under its programme, while DLOs/Yuen Long and Tuen Mun do not. Some DLOs tolerate unenclosed rooftop structures that take up less than 50% of the roof; others do not.

Differences in Opinion between BD and Lands D

27. BD and Lands D hold different views as to when a UBW is a "WIP". If the structural framework has been completed, BD will not take action despite signs of works still going on. Some 200 cases have thus been returned to Lands D as "new UBWs". However, Lands D does not have the resources and have not taken action on the cases returned.

Case Studies

28. Some of the cases that we have studied illustrate that:

(a) BD and Lands D disagree on "WIP" cases;

(b) uncooperative owners could delay enforcement action for more than five years;

(c) DLOs could delay or abort re-entry action in the face of difficulties, e.g. when the house with UBWs is already occupied by several households, causing problems in eviction;

(d) DLOs do not take action on cases of recurrent breach;

(e) villagers' objections have created obstacles for BD enforcement action; and

(f) a new owner might unknowingly assume responsibility for the ex-owner's UBWs.

Observations and Opinions

NTEH Policies

29. Government policy on NTEHs or "small houses" for indigenous villagers was established long ago. With the development of NT, it raises the question whether exemption should continue to apply. We note that HPLB has been conducting a review of the small house policy since 1995. We consider that this aspect of the policy should be examined and the review in general expedited.

Causes for Concern

30. UBWs in NTEHs are a difficult problem, given the limited resources and low priority for action. The situation has deteriorated since our last direct investigation in 1996. We recognise that Lands D's resource constraints have made firmer enforcement difficult but continued proliferation will simply allow the problem to get out of control. Lands D's mode of enforcement is ineffective and a cause for concern. Much time is spent on preparation but cases are not enforced as the Department backtracks from initiated action in the face of difficulties. We consider that when situations call for enforcement, the Department should firmly exercise its powers and take enforcement action to completion.

The Strategy

31. Given the history of the problem, the 2001 working group's focus of action on WIPs and blatant breach is a step in the right direction. However, the strategy fails to address the fundamental issues of resource constraints and the limitations of enforcement measures. There is a need for HPLB to revamp the current strategy on

UBWs in NTEHs, and develop and communicate to the community an enforcement policy setting out clear priorities and focus of action.

Effectiveness of Enforcement Measures

32. The measures under the existing strategy have not effectively contained the problem.

33. BD's WIP operations have a success rate of only about 20%. Neither BD nor Lands D takes action on over 30% of the cases of new UBWs detected. BD's follow-up action on outstanding cases has also been slow.

34. Re-entry action is labour-intensive and time-consuming. Due to resource limitation and the serious implications of re-entry action, Lands D has rarely taken, and at times not followed through, such action.

35. Lands D's toleration of minor breach while charging a penalty premium is a reasonable alternative to enforcement, but this has limited application and little impact on containing the problem.

36. The commonest action taken is registration of advisory letters against property titles. However, it only serves to alert potential buyers to the presence of UBWs on the property. Owners having no intention to sell their properties are not deterred. As no further action is taken against them after the registration of letters, their readiness to purge their UBWs is bound to decline. The success rate of such action has dropped from 80% in 2000 to about 21% in 2003.

Inefficiencies Observed

37. Staff shortage has always been a problem for lease enforcement. In the current financial climate, additional resources are unlikely to become available. Much of DLOs' resources for lease enforcement is wasted on repeated site inspections, requests for legal advice and for entry for inspections, etc., which often may not yield

results. We consider that Lands D should revise work processes and practices to optimise use of its limited resources.

38. Each DLO is allowed to decide on its own action plans, resulting in inconsistencies among DLOs. These inconsistencies could lead to accusations of unfair treatment from owners.

39. Lands D HQ has a responsibility to guide and advise front-line staff in coping with the difficulties encountered in their lease enforcement work. However, it has actually not done much in this respect.

40. Lands D and BD both have an enforcement role, each observing its own legislation and priorities. Their differences in opinions have deterred them from taking a coordinated approach on enforcement matters and given the public the impression that they tend to pass the buck.

Publicity and Owners Attitude

41. We consider that ineffective enforcement action has reinforced owners' and villagers' perception about DLOs' toleration of UBWs and hence given rise to the complaints and objections against lease enforcement teams in action. To correct this perception, Lands D needs to inform the public of its enforcement responsibility on UBWs in NTEHs, followed by firm and consistent enforcement action.

Other Actions

Rates Exemption

42. Inspections show that about 15 % of the rates-exempted houses have UBWs, thus breaching one of the criteria for exemption. This calls for a closer working relationship between HAD and Lands D, with DLOs checking ownership of detected UBWs for HAD's action against those who are enjoying rates exemption.

Protection for Potential Buyers

43. A purchaser buying an NTEH without knowledge of its UBWs could have

serious consequences. There should be more publicity on what prospective buyers should know for the purchase of village houses.

Conclusions and Recommendations

44. The Ombudsman acknowledges that due to the widespread problem and limited resources, it would not be possible for Government to eliminate it in the foreseeable future. Strategies and measures should, therefore, aim for containment of the problem, with **rationalisation** of non-serious cases and **rigorous enforcement** for serious ones, with **re-entry** as the last resort.

45. On this basis, The Ombudsman makes 18 recommendations for consideration by HPLB, Lands D, BD and HAD:

Overall Directions

(a) To review the current enforcement strategy and develop a realistic enforcement policy for containment of UBWs in NTEHs;

(b) To explore the feasibility of rationalisation of existing UBWs that are safe, not serious and thus tolerable, subject to payment of a penalty. This is an extension of the concept of "penalty premium";

(c) To assess and monitor the situation regarding UBWs in NTEHs through the regular use of aerial photographs;

Enforcement

General

(d) To review the inefficiencies identified in this report for developing improvement measures and to set targets for achievement;

WIPs

(e) To step up action against non-compliance with removal orders;

(f) To explore the feasibility of expanding the current WIP operations to cover new UBWs;

Lease enforcement

(g) To closely monitor enforcement action to ensure due completion and to suspend actions only on good grounds;

(h) To develop an action plan against owners of UBWs not purged and recurrent breach;

(i) To develop a plan for tackling unauthorised four or five-storey houses;

(j) To standardize enforcement practices among DLOs as far as possible, given local differences;

Cooperation and Coordination

(k) To reconcile any differences between Lands D and BD over WIP operation;

(l) To set up a joint team to tackle WIPs and new UBWs;

Optimization of Resources

(m) To train and guide front-line staff to instill greater confidence in them;

(n) To simplify work processes and streamline procedures, to redeploy staff and optimise the use of limited resources.

Publicity

(o) To publicise widely Government's revised strategy for public awareness;

(p) To enlist Heung Yee Kuk's assistance in explaining and disseminating Government's stand on UBWs to villagers;

(q) To alert potential NTEH buyers to the risk of UBWs by widely publicising Lands D's pamphlet on the purchase of the village houses.

Monitoring of Rates Exempted Houses

(r) To work out a system under which Lands D conducts matching checks on ownership of detected UBWs to see if any of such owners are enjoying rates exemption and report such cases to HAD for action

Final Remarks

46. HPLB, Lands D, BD and HAD generally accept the above conclusion and recommendations.

- End -

Office of The Ombudsman
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LEGEND OF ABBREVIATIONS

BD	Buildings Department
BO	Buildings Ordinance
BO(NT)O	Buildings Ordinance (Application to the New Territories) Ordinance
C of C	Certificate of Compliance
C of E	Certificate of Exemption
DLO	District Lands Office
DB	Director of Buildings
DHA	Director of Home Affairs
D Lands	Director of Lands
HAD	Home Affairs Department
HQ	Headquarters
HPLB	Housing, Planning and Lands Bureau
HYK	Heung Yee Kuk
Lands D	Lands Department
NT	New Territories
NTEH	New Territories Exempted Houses
PELB	Planning, Environment and Lands Bureau
RVD	Rating and Valuation Department
RC	Rural Committees
SHPL	Secretary for Housing, Planning and Lands
UBW	Unauthorised Building Works
WIP	Works-In-Progress

LIST OF ANNEXES

ANNEX	TITLE	PARAGRAPH
1	Information on New Territories Exempted Houses and Unauthorised Building Works	1.1
2(a)	Recommendations of the 1996 Direct Investigation Report	2.1
2(b)	Implementation of Recommendations	2.1
3	Staffing in NT DLOs for Lease Enforcement	2.3
4	Buildings Department - Enforcement Policy Against UBWs, April 2001	4.3
5	Order of Priority for Lease Enforcement Action	4.5

1

INTRODUCTION

BACKGROUND

1.1 The problem of unauthorised building works ("UBWs") in New Territories exempted houses ("NTEHs"), commonly dubbed "small houses", has long existed. **Annex 1** provides background information on NTEHs and UBWs and the departments responsible for their control. In February 1996, this Office completed a direct investigation into the enforcement action taken by the Lands Department ("Lands D") against UBWs in NTEHs. The investigation confirmed the seriousness of the problem of UBWs and recommendations were made for more effective enforcement.

1.2 While Lands D and the then Planning, Environment and Lands Branch ("PELB"), forerunner of the Housing, Planning and Lands Bureau ("HPLB"), accepted most of the recommendations in our investigation report, some of them have yet to be implemented in full or at all (para. 2.1).

1.3 In 2001-2002, our investigation into a complaint[1] revealed that tackling of UBWs in NTEHs had continued to be slow and without much success. In May 2002, another complaint led this Office to conduct an assessment on Lands D's mechanism for reviewing priorities for action against UBWs under its lease

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[1] Annex 12 of The Ombudsman's 2003 Annual Report: OMB 2001/0542, OMB 2001/0929

enforcement programmes (para. 4.18). We concluded that UBWs was a difficult problem but proliferation, if unchecked, would only further aggravate the situation. We were concerned that the continued lack of action against UBWs would result in massive disregard for law enforcement. This would breed disrespect for the Administration and even disregard for the law. In October 2002, The Ombudsman invoked section 16(3) of The Ombudsman Ordinance, Cap. 397 and reported the matter to the Chief Executive. We pointed out that before any long-term strategies could be worked out to resolve the problem, the Administration should consider appropriate action to stop further proliferation of UBWs. Meanwhile, there were media reports that entire buildings had been constructed in parts of NT without authority.

1.4 In response to our enquiry in July 2003, HPLB admitted that the problem of UBWs in NTEHs had not been contained or reduced since 1996.

1.5 Against this background, The Ombudsman considered a second direct investigation necessary. Accordingly, on 14 November 2003, the Secretary for Housing, Planning and Lands ("SHPL"), the Director of Lands ("D Lands") and the Director of Buildings ("D B") were informed of her decision to conduct another direct investigation under section 7(1)(a)(ii) of The Ombudsman Ordinance.

PURPOSE AND AMBIT

1.6 Our aim is to identify measures to prevent the further proliferation of UBWs in NTEHs. The ambit of our investigation includes:

(a) tracking development since our last direct investigation in 1996;

(b) in this light, examining the factors contributing to the continuation, and even proliferation, of the problem;

(c) studying the latest strategy and current measures taken by Lands D and the Buildings Department ("BD") against UBWs in NTEHs; and

(d) assessing the effectiveness and appropriateness of these measures.

METHODOLOGY

1.7 For this investigation, we have studied relevant information provided by HPLB, Lands D and BD. This includes administrative procedures, case files and statistical data. We visited District Lands Offices ("DLOs") of Lands D and the Special Action Unit of BD. We had discussions with their staff. Members of the public were invited to give comments and suggestions from 14 November to 15 December 2003. We received two written submissions, one of them from the Land Executives Association. In the course of the investigation, we also sought information from the Director of Home Affairs ("DHA") on the rates exemption process.

INVESTIGATION REPORT

1.8 On completion of our investigation, a draft investigation report was sent on 23 July 2004 to SHPL, D Lands and DB and DHA for comments. These were received on 10 and 13 August 2004. This final report was issued on 26 August 2004.

2

DEVELOPMENTS 1996 – 2003

1996 DIRECT INVESTIGATION

2.1 Our 1996 investigation concluded that UBWs in NTEHs had been proliferating. There was no effective deterrent against UBWs in NTEHs and Lands D's lack of priority[2] and resources had contributed to the growing problem. We made recommendations to Lands D and the then PELB for more effective enforcement. Details of our recommendations and their implementation between 1996 and 2003 are at **Annex 2(a) and (b)**.

2.2 There has been little progress in implementing some of the major recommendations due to a combination of factors, mainly insufficient resources and lack of a positive attitude or focus on the problem.

INSUFFICIENT RESOURCES

2.3 The deployment of lease enforcement staff in the NT DLOs is set out

[2] The order of priority for taking lease enforcement action against breach of permitted uses of buildings was established in 1975 by the Governor-in-Council. Top priority was given to dangerous or obnoxious undertakings in residential buildings; the lowest priority to unauthorised additions to buildings, which include UBWs in NTEHs.

at **Annex 3**. The establishment in DLOs for lease enforcement has remained fairly small and staff are often re-deployed to more pressing duties, e.g. processing small house applications. It was not until 2003 that the lease enforcement teams were augmented in districts with serious UBW problems, e.g. Yuen Long, Sai Kung and Tuen Mun. A key member of the lease enforcement team in DLO/ Islands has been on loan to the Lands D Headquarters ("HQ") for over a year, resulting in suspension of the district's lease enforcement programme.

IMPLEMENTATION OF RECOMMENDATIONS

Review of Priority for Enforcement

2.4 At the time of our last investigation, the then PELB did not agree that the problem of UBWs had intensified and considered that with limited resources, it was not necessary to review the order of priority for enforcement. In August 2001, in the wake of one of our investigations into a UBW case, HPLB appointed an internal working group comprising BD and Lands D representatives to map out a strategy to tackle the problem (para.4.6).

Assessment of the Problem

2.5 Although Lands D had accepted our recommendation for a survey to assess the magnitude of the problem, the proposed survey was given low priority in the Annual Estimates exercises and was not allocated funds. The survey, therefore, never took off. While commenting on one of the funding requests in September 1999, the Secretary for the Treasury pointed out that "we consider the task (of

conducting the survey) a job of the lease enforcement team. The Secretary for Planning, Environment and Lands ("SPEL") may wish to review the adequacy of the existing legislation and enforcement actions for NTEHs". However, that suggestion was not taken forward.

Alternative Deterrent Measure

2.6 We recommended SPEL and Lands D to consider alternative measures, e.g. an equitable penalty system as a stop-gap measure against UBWs. However, they both concluded that such a system would be fraught with administrative difficulties and resource implications. Lands D was also concerned that if the proposed penalty system were implemented, it would give a false hope or impression to offenders that their UBWs would eventually be tolerated. Lands D's preference was to step up lease enforcement action when additional resources became available. SPEL and Lands D neither implemented the proposed system nor considered any alternative deterrent measure, even after the appointment of the 2001 working group.

Public Awareness

2.7 SPEL readily accepted our recommendation to solicit the assistance of local bodies in publicising Government's position on UBWs in NTEHs, but little has actually been done. Even when the 2001 working group had decided to step up action against UBWs in NTEHs, no briefing was held for the Heung Yee Kuk ("HYK") and Rural Committees ("RCs") on the new strategy prior to implementation. It was only when HYK queried BD's actions against a case of UBW in progress in Yuen Long (Case 7, para. 6.9) that BD and Lands D explained their respective

policies to the Kuk.

2.8 Over the years, Lands D has only taken the following publicity measures:

(a) producing three pamphlets on the purchase of village houses in NT (1998), the building of NTEHs (1999) and how to apply for small house grants (revised in 2001); and

(b) posting notices on newly completed NTEHs to remind owners/tenants of the need to comply with land lease conditions.

2.9 On the other hand, since 2001 BD has spent over $9 million on publicity campaigns focusing on building safety, including a pamphlet and an API on enforcement against UBWs in private buildings in the urban areas. UBWs in NTEHs are not a BD priority, hence no specific publicity on the subject.

3

MAGNITUDE OF THE PROBLEM

UBWs IN NTEHs

3.1 Common examples of UBWs in NTEHs are canopies, enclosed balconies, ground floor extensions, additional storeys, rooftop structures and internal vertical partitions. The most serious are entire buildings constructed without approval. UBWs usually "add value" to the property, e.g. increasing the roofed-over area by an extra storey or more usable space. Thus, owners and occupants are not keen to remove them, even when required to do so.

3.2 The magnitude of the problem is reflected in various statistics in the following paragraphs. As at 31 December 2003, Lands D has detected a total of 6,575 UBWs over nine NT districts:

District	Yuen Long	Tuen Mun	Sai Kung	Tai Po	Tsuen Wan	Sha Tin	North	Kwai Tsing	Islands
UBWs	2,119	2,393	612	367	281	321	266	172	44

Source: Lands D

3.3 These cases were detected during patrols by Lands D staff or reported by the public and other Government departments. The problem is in fact more serious than that as evidenced by the following examples:

(a) The number of detected UBWs in Tuen Mun was around 400 in 2001. This was revised to over 2,300 (para. 3.2) after a district general survey conducted in 2003;

(b) Only 44 cases were detected in Islands District (para. 3.2), as there was insufficient staff to conduct patrols. A district survey conducted between 1988–1992 had already estimated the number to be over 2000.

COMPLAINTS RECEIVED

3.4 Complaints of UBWs are made by members of the public to DLOs. They are often made by neighbours with first-hand knowledge of the UBWs, especially where they adversely affect nearby buildings or the environment. From January 2000 to December 2003, data on complaints received by Lands D are as follows:

Cases / Year	Received	Substantiated (Note 1)	%
2000	537	498	92.7%
2001	504	452	89.7%

2002	486	453	93.2%
2003	409	318 (Note 2)	77.8%

Source: Lands D

Note 1: Breach of lease conditions is confirmed

Note 2: Excluding 66 complaints not verified by DLO/ Islands due to staff shortage.

3.5 DLOs take action only on complaints of blatant breach and cases falling within their district lease enforcement programme (para. 4.18). On average, 50% of the complaints substantiated in the past four years were classified as low priority and not dealt with.

ASSESSMENT OF THE PROBLEM

3.6 Lands D does not have accurate figures on the size of the problem. In April 2004, DLOs described the problem within their districts to be:

Very serious	:	Yuen Long
		Tuen Mun
Serious	:	North
		Tai Po
		Sai Kung
Tolerable	:	Islands
		Kwai Tsing
		Tsuen Wan
		Sha Tin

ENFORCEMENT TIME FRAME

3.7 Lease enforcement involves the registration of advisory letters against property titles (para. 4.20), and re-entry of the land (para. 4.14). In 2003, the working group asked Lands D to estimate the time required to complete enforcement action on existing UBWs in the NT. The returns were revealing and astounding:

- four districts - less than 10 years
- three districts - 18 to 23 years
- two districts - 50 and 97 years

It was evident that DLOs interpret "completion" of lease enforcement differently. Some DLOs consider action as complete upon the registration of advisory letters, others go for the full length (i.e. e-entry). The estimates not only show the size of the problem, but also DLOs' inconsistency in enforcement (para. 5.11) and Lands D's inability to tackle UBWs in the short term.

SERIOUS BREACH

3.8 Examples of UBWs constituting blatant breach of lease conditions are multiple breach, size or height of buildings grossly in excess of the limits, significant unauthorised alterations and even an entire house built on Government land (para. 4.15).

3.9 In Yuen Long, North and Sai Kung, there are about 2000 village-type houses built on old schedule lots with four or five storeys, without approval from either DLOs or the Building Authority (i.e. DB). For those built on private land,

Lands D considers them to be outside DLOs' authority (para. 5.7) and within the purview of the Buildings Ordinance ("BO"), Cap. 123.

4

ENFORCEMENT POLICIES AND PROCEDURES

STATUTORY AUTHORITY AND ENFORCEMENT POLICIES

4.1 Both BD and Lands D are responsible for enforcement against UBWs in NTEHs in accordance with their respective statutory authority and policies.

Buildings Department

4.2 Under the BO, BD has responsibility for to tackle UBWs in private buildings. Section 24 of the BO empowers BD to issue statutory orders requiring property owners to remove any illegal or dangerous structure within a specified period, failing which the UBW may be demolished by Government at the owners' expenses. Section 40(1) empowers BD to prosecute persons who carry out building works without approval. Non-compliance with a removal order is an offence under section 40 (1B), liable to one year's imprisonment, a principal fine of $50,000 plus a daily fine of $5,000.

4.3 BD's prime concern is building safety and its efforts invariably focus on UBWs on multi-storey buildings in the urban area. Its current enforcement policy,

revised by Government in April 2001 **(Annex 4),** gives emphasis to the removal of UBWs constituting imminent danger to life or property and new UBWs, especially those under construction, to prevent proliferation. Resources are also directed to tackling rooftop structures on single-staircase buildings to remove the risk of their becoming fire traps for the residents of the entire buildings. Due to resource constraints, other types of UBWs are accorded lower priority.

Lands Department

4.4 Lands D's responsibility for NTEHs stems from its land administration function to ensure that land leases are complied with through enforcement of lease conditions (**Annex 1**). Section 12 of the Land (Miscellaneous Provisions) Ordinance, Cap. 28 empowers it to demolish UBWs. Under section 13, Lands D staff have the right to enter premises for inspection. Lands D can also re-enter the land and cancel the lease by invoking section 4 of the Government Rights (Re-entry and Vesting Remedies) Ordinance, Cap. 126.

4.5 The current lease enforcement policy, which sets out Lands D's order of priority for action, was endorsed by the Executive Council in 1975 (**Annex 5**). Because of the wide coverage of lease enforcement work against its limited resources, Lands D accords priority to dealing with the misuse of residential premises for dangerous or obnoxious activities. Unauthorised additions to buildings, including UBWs in NTEHs, are low priority.

2001 Working Group Strategy

4.6 In 2002, the 2001 working group (para. 2.4) prescribed the following strategy for containing the problem of UBWs in NTEHs:

(a) **BD** to take priority action against "works in progress" ("WIPs") or UBWs posing danger to life or property;

(b) **Lands D**

(i) to take priority lease enforcement action against UBWs constituting blatant breach;

(ii) to tolerate UBWs of minor irregularities subject to payment of a penalty premium; and

(iii) to take lease enforcement action in all other cases according to its action programmes, which will eventually cover all villages.

Consequently, Lands D has reviewed and revised its priorities for lease enforcement, classifying items into high, medium and low priority. Blatant breach, such as unauthorised structures on old schedule agricultural lots and over-sized NTEHs, is now high priority. DLOs' lease enforcement programmes (para. 4.18) are medium priority. All other cases are accorded low priority.

WORK PRACTICES

Organization

4.7 In Lands D, DLOs' lease enforcement teams (comprising Land

Executives and Land Inspectors) are responsible for enforcement against UBWs in NTEHs in addition to other duties. Lands Instructions provide procedural guidelines to the teams. A District Review Board, chaired by either the District Lands Officer or the Chief Land Executive, reviews work progress and discusses problem cases with the team once every three to four months.

4.8 BD's Special Action Unit is responsible for WIP operations. Enforcement action (para. 4.10) is contracted out to firms of professional consultants provided with BD's manual and instructions on enforcement matters. The Unit (staffed by engineers and surveyors) monitors the work of the consultants through vetting their investigation reports, draft orders and letters. The decision for issue and the preparation of removal orders remains the responsibility of the Unit. In February 2004, new contracts were awarded, under which the consultants are required to patrol districts for WIPs.

WIPs in NTEHs

4.9 BD actions against WIPs, with assistance from DLOs under instruction from Lands D to form special land teams to patrol villages for early detection of WIPs. The two departments have established a liaison system for taking prompt action once a WIP case is detected. Upon detection, Lands D will refer the case to BD with relevant information. BD's computer terminals also have access to Lands D's land plans. The BD consultant will conduct inspection within 48 hours. If BD requires further information, Lands D aims to supply it within two working days. Speedy action is crucial as some UBWs can be erected within a short time.

4.10 The process involves the following steps:

(a) Lands D to supply BD with details of the WIP e.g. location, structure, relevant land plans and land status information;

(b) BD consultant

(i) to conduct inspections to verify if the works are in progress. If completed, the UBW will be treated as new and referred back to Lands D for action. If premature (e.g. just a fence being built) and impossible to determine whether the final structure is a UBW[3], it will be recorded for future inspections;

(ii) to post a warning letter on site, requiring the owner to cease work and demolish the erected structure;

(iii) to issue a removal order under section 24 of the BO for confirmed WIP cases;

(iv) to conduct follow-up inspection to confirm compliance; and

(v) to issue a letter of compliance to the owner upon clearance of the WIP.

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[3] According to BD's internal instructions, a fence wall is allowed as an exempted structure.

4.11 Follow-up inspection on premature cases should take place within four to six weeks after the first visit. If the UBW is found to have been completed, further enforcement action (e.g. issue of removal order) will be taken by BD. The BO provides for owners served with a removal order to appeal to an Appeal Tribunal. When the owner appeals, enforcement action will be suspended until the Tribunal concludes the hearing. Since the launching of operations against WIPs in NTEHs in February 2002, there have been 17 appeal cases: ten of them were completed, with the appellants withdrawing in five cases, the Tribunal allowing one case and dismissing four.

4.12 Between February 2002 and June 2004, the number of WIPs reported and the action taken by BD were as follows:

WIPs reported to BD	**Removal Orders**		**Under Action** (Note 1)	**No further action** (Note 2)
	Served	**Complied With**		
570	108 (Note 3)	21	146	340

Note:

(1) Includes cases under preparation for issue of removal orders, cases pending voluntary removal by owners and premature cases pending follow-up action

(2) Cases returned to Lands D, including new UBWs (i.e. works completed), exempted cases and structures erected on Government land.

(3) Includes superseding orders

4.13 If a removal order is not complied with, BD can either engage its

contractor to demolish the UBW or prosecute under the BO. Since February 2002, BD has initiated prosecution against 13 WIPs in NTEHs, of which two were convicted. The low prosecution rate is due to the temporary suspension of enforcement action against WIPs in NTEHs in 2003 as a result of HYK's queries (Case 7, para. 6.9).

Re-entry Action on Blatant Breach

4.14 As part of the re-entry procedures, Lands D first serves the owner with a warning letter to require the removal of the UBW within a specified period (usually 28 days). An extension up to six months may be granted subject to payment of a forbearance fee[4]. If the UBW is not cleared upon expiry of the specified extension period, a final warning letter will be issued, followed by a notice advising the owner of Government's intention to re-enter the land within two weeks. If there is still no positive response from the owner, Lands D will proceed to register a vesting notice and re-entry documents with the Land Registry, publish a notice in the Government Gazette, and notify the owner. The land and the property thereon will then become Government property. The owner can seek relief from the court or lodge an appeal with the Chief Executive within six months of the publication of the gazette notice. Legal advice is necessary for every step of the re-entry process.

4.15 In May 2003, Lands D categorized the following as blatant breach for priority action:

(a) newly constructed unauthorised houses with encroachment on Government land;

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[4] Amount payable depends on the size of the UBW and the fair market value of the house concerned.

(b) unauthorised village houses built on old schedule agricultural lots;

(c) five-storey buildings on New Grant Building Lots; and

(d) oversized NTEHs (exceeding the limit of 65.03 square metres by five square metres or more).

4.16 Due to resource constraints, Lands D HQ selected the three most blatant cases under category (a) for immediate re-entry action. It also asked DLOs to search for cases under categories (c) and (d) for action. In January 2004, DLOs reported that one case in category (c) and 18 in category (d) had been identified. Of the 18 oversized NTEHs, 17 are unauthorised developments of three to five storeys on old schedule lots in Tuen Mun. As at June 2004, DLO/Tuen Mun was conducting research and seeking legal advice to help decide on the course of action. In the past four years, only two re-entry cases were completed: one involved multiple and excessive irregularities and the other was a recurrent breach.

Toleration of Minor Breach

4.17 Lands D has the discretionary authority to tolerate minor breach of development conditions[5] for the lifetime of the building subject to payment of a "penalty premium" (as distinct from "forbearance fee" in re-entry action (para.4.14)). Such cases are usually detected during compliance inspections prior to the issue of the Certificate of Compliance ("C of C") (**Annex 1**). The commonest types of

[5] E.g. marginally exceeding the height or area restrictions.

UBWs in NTEHs (e.g. rooftop structures, enclosed canopies and balconies) are not minor breach and so are not tolerated. Between 2000 and 2003, each year, about 53 cases of minor breach were tolerated and an average penalty premium of $770,000 collected.

Lease Enforcement Programmes

4.18 Lease enforcement programmes are scheduled actions targeted at selected villages. There are close to 700 villages in NT and each DLO draws up its programme prioritising villages for action in the light of the specific local situation, the seriousness of the UBW problem and the staff resources available.

4.19 As most UBWs are considered not serious, re-entry action is seldom instituted. In the early 1990s, term contractors were engaged to carry out demolition to cope with cases of persistent breach. However, the shortage of funds, manpower and technical expertise (including support from other departments) in recent years has limited Lands D's demolition action. The commonest action at present under lease enforcement programmes is to issue and register advisory letters.

Issue and Registration of Advisory Letters

4.20 Upon detection of a UBW in breach of the lease, DLO will issue an advisory letter to the owner pointing out the breach and allowing 28 days to purge the UBW. If the owner fails to comply after two warnings, DLO will register the letter against the property title at the Land Registry and inform the owner. When in doubt, DLO will seek legal advice to confirm the existence of a breach prior to registration. If the breach is rectified afterwards, a letter will be sent signifying no further action and warning the owner that if the breach recurs, further enforcement

action (e.g. re-entry action) will be taken without further notice. This notification letter will also be registered with the Land Registry.

4.21 Periodic inspections will be conducted to monitor the house concerned in the next 12 months. If the UBW re-appears, DLO will issue a warning letter requiring rectification and warning the owner of re-entry action. If the breach recurs after the monitoring period or if the property has changed ownership, any UBW found will be classified as a new one. No action will be taken until the lease enforcement programme is due in the area concerned.

4.22 From 1998 to 2003, a total of 1967 advisory letters were issued, with some 947 registered with the Land Registry.

Year	Warning/advisory letters issued	Cases purged	Success rate
2000	600	501	83.5%
2001	684	355	51.9%
2002	578	222	38.4%
2003	571	123	21.5%

4.23 DLOs seldom take action against owners refusing to rectify their breach after registration of an advisory letter. Some advisory letters have been registered for ten years with no further action taken.

MONITORING OF RATES EXEMPTED HOUSES

Rates Exemption for Indigenous Villagers

4.24 Indigenous villagers are eligible for exemption from payment of Government rates under section 36(3) of the Rating Ordinance, Cap. 116 for houses located outside Designated Village Areas, provided they meet the stipulated requirements. The Director of Home Affairs ("DHA") is the approving authority. One of the criteria[6] for rates exemption is that the house must be free of UBWs. Theoretically, this helps to curb the growth of UBWs in some NTEHs.

Compliance for Rates Exemption

4.25 Previously, the Home Affairs Department ("HAD") had relied on Lands D and the Rating & Valuation Department ("RVD") to verify whether a house under application for rates exemption is free of UBWs and vacant or occupied by the owner or his/her immediate family for domestic purposes. Due to resource constraints of Lands D, a self-declaration clause by owners that the house is UBW-free has been included in the rates exemption application since 1997 to replace Lands D's case-by-case verification. RVD continues to conduct site inspections to verify the size and height of the houses. If UBWs are detected, RVD will notify HAD, who will in turn ask Lands D to verify. Subject to comments from RVD and Lands D, HAD approves or rejects the application for rates exemption.

4.26 After approval of rates exemption, HAD randomly selects 90 cases at six-monthly intervals for Lands D to check for UBWs. The owners concerned will be given two months to clear any detected UBWs, failing which DHA would withdraw the rates exemption. From 1997 (when self-declaration was introduced) to December 2003, Lands D had found UBWs in 131 cases out of 851 inspections (15%). Rates exemption has been cancelled in 29 cases (of which nine cases have been

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[6] Criteria: size and height of house do not exceed restrictions, free of UBWs, either vacant or occupied by owner or immediate family for domestic purpose.

rectified and rates exemption re-granted). Cancellation for another 27 cases is underway, with the remaining 75 cases still under consideration.

5

DIFFICULTIES AND PROBLEMS IN ENFORCEMENT

5.1 The present state of UBWs in NTEHs is largely due to inadequate and ineffective enforcement, caused by operational difficulties of Lands D and BD and compounded by the different practices of the two departments.

DIFFICULTIES

Resource Constraints

5.2 The total manpower for lease enforcement in the NT DLOs stands at around 50 (**Annex 3**). Such staff are responsible for all lease enforcement matters in their districts, not only those relating to UBWs. While the current staffing is already 30% above the 1996 establishment, the lease enforcement teams have remained small in numbers and some districts need to take years to tackle the existing UBWs. Additional resources are necessary for effective enforcement. Not many DLOs are able to provide a special land team (para. 4.9) dedicated to detection of WIPs. They have to enlist the assistance of other sections. At least one DLO has been unable to

carry out its lease enforcement programme due to shortage of staff. Resources for carrying out demolition work are not available (para. 4.19). For WIP cases, Lands D relies on BD to take the necessary action. Except for blatant breach, Lands D tends to resort to less manpower-dependent and less confrontational actions, e.g. issue of advisory letters. Shortage of staff has also meant that recurrent breach and further action after registration of advisory letters (para. 4.21) are often not followed up.

5.3 As for BD, while it has had a boost in resources with Government's strategy of April 2001 for building safety, the additional funding was calculated on the basis of UBWs and other building safety and preventive maintenance measures in the urban area. No allowance had been made for UBWs in NTEHs.

Establishing Proof

5.4 The basis of lease enforcement is lease conditions. Collection of evidence to prove a breach of lease conditions could be complicated and difficult because:

(a) Over the years, many types of leases/grants/licences with different conditions have evolved. Some leases are signed decades ago where the conditions are not as clearly set out as modern day leases. Apart from studying the lease conditions, cross-checking with other records held by DLO (e.g. C of Cs) is necessary. DLOs often have to seek legal advice to confirm a breach before determining enforcement;

(b) Lease records may be missing. Lot boundaries may not be

clearly demarcated, thus necessitating a mapping survey;

(c) Collection of evidence may require inspection inside the premises for measurement of the structures and/or boundaries. Some owners do not cooperate readily. Lands D's internal instructions point out that the right of entry under section 13 of the Land (Miscellaneous Provisions) Ordinance (para. 4.4) is not absolute and the owner's consent for entry is necessary. There had been instances where DLO staff were unable to collect the necessary evidence after repeated requests for entry.

Attitude of Owners and Villagers

5.5 Many owners are reluctant to demolish their UBWs as they have spent money on construction and benefit from them. Some indigenous villagers feel that they can build or rebuild their houses without having to seek approval from DLOs. Some even challenge the authority of DLO/BD for enforcement. At times, enforcement action triggers confrontation and threats have been made on the personal safety of DLO staff. Often, the local community sees the action of DLO as infringing on their rights. Straightforward enforcement issues can become politicized.

Off-site Houses

5.6 Lot boundaries mapped and recorded in the older days may not be accurate. Moreover, when villagers built their houses, the boundaries drawn on site might not conform to the records. With the passage of time, the cumulative effect of one house being slightly

off boundary may result in a whole row of houses being built outside their intended boundaries. It may be difficult to re-align the affected lots because of the number of sites and houses involved. The handling of these cases is, therefore, slow. At times, DLOs can do little to rectify the irregularities.

Unauthorised Developments on Old Schedule Lots

5.7 Lands D is aware that many four or five-storey houses on old schedule lots (para. 3.9), built and used by villagers or redeveloped from old or dilapidated houses, have been constructed without authority. However, DLOs do not pursue rigorous lease enforcement action against these houses. We believe the following may be relevant factors:

(a) Lease conditions do not stipulate any restrictions on height or size and lease enforcement might be subject to challenge in court; and

(b) Technically speaking, they are not NTEHs as no exemption has ever been given by DLOs under the Buildings Ordinance (Application to New Territories) Ordinance ("BO(NT)O") for their construction. The Lands D pamphlet on construction of an NTEH states that "any NTEH constructed without the Certificate of Exemption ("C of E") for building works shall be subject to enforcement action." These houses on private land are considered to be in breach of the Buildings Ordinance and are referred to BD for action. However, given its caseload in the urban area, BD classifies such cases in NT as low priority. As a result, the number continues to grow and enforcement becomes increasingly difficult with the passing years.

In 2003, DLO/Yuen Long, which has the most serious problem, identified a test case for conducting lease enforcement action. Action is in progress.

PROBLEMS

Organisation Culture

5.8 Lands D is aware that NTEHs are to some extent related to indigenous villagers' rights and enforcement action could easily be entangled with village politics. The Department has, therefore, been keeping action low-key and non-confrontational. Lease enforcement teams spend considerable time on inspections and liaison with owners for voluntary clearance of UBWs. Difficult owners could take advantage of this to stall or delay enforcement action. Some would go to the extent of ignoring DLOs' warnings, regarding them as empty threats.

Follow-up Action

5.9 The average success rate of enforcement action in the past few years was less than 50% (para. 4.22). In the unsuccessful cases, DLOs stopped taking action after registering the advisory letters with the Land Registry and they steadily build up in DLOs' records. In July 2002, Lands D HQ wrote to DLO/Yuen Long, which had the highest number of registered letters, and advised on the need to follow up outstanding cases as prolonged inaction might be taken as a sign of Government acquiescence. DLO/Yuen Long has since selected a few cases for action under its lease enforcement programme.

5.10 Some UBWs can be erected easily and speedily. A UBW may be re-erected, sometimes almost immediately, after removal. More often than not, DLOs take no further action against such recurrent breach until the villages concerned are included in their lease enforcement programme.

Inconsistent Practices

5.11 Lands D HQ provide only broad guidelines on enforcement priorities, leaving individual DLOs to decide what to act on, how and when, in the light of the local situation and manpower position. The devolution of authority to DLOs is operationally necessary, but due to differences in the social, political and land administration issues of the districts, some inconsistencies in practices have evolved over the years (para. 3.7). For example:

(a) DLO/Tuen Mun suspended its lease enforcement programme from November 2002 to September 2003 to make available the team for conducting a district-wide survey on UBWs. As a result, the number of UBWs cleared by that office during that period was much lower than other DLOs;

(b) Many DLOs do not institute re-entry action except for blatant cases, but DLO/Sai Kung has initiated re-entry action as part of its lease enforcement programme, resulting in a slower pace of activity but higher success rate. Other DLOs (e.g. Tuen Mun and Yuen Long, both with very serious UBW problems) have confined their lease enforcement action to the registration of advisory letters;

(c) Some DLOs tolerate un-enclosed rooftop structures not exceeding 50% of the roof area; and

(d) DLO/Islands has suspended its lease enforcement programme altogether for over a year due to shortage of staff.

Differences in Opinion between BD and Lands D

5.12 Under the current strategy, BD is responsible for enforcement against WIPs on referral by DLOs. However, BD and Lands D hold different views as to when a UBW should be considered to be still "in progress". BD considers that if the structural framework of a UBW is completed at the time of inspection, it should take no action and would revert the case to Lands D. Unless Lands D can provide evidence that the works were being carried out at the time of DLO's first detection, BD would not reconsider the case. Of the 571 suspected WIPs referred by DLOs (para. 4.12), BD acted on only 40% of the cases. Of the 340 cases returned to Lands D, some 200 are new UBWs (the remaining 140 were either UBWs found on Government land or exempted cases). Meanwhile, Lands D claims that it does not have the resources for priority action on the new UBW cases and no action is taken on them.

6

CASE STUDIES

6.1 The following cases illustrate how Lands D and BD tackle UBWs in NTEHs, and demonstrate the difficulties and problems involved in enforcement.

Case 1 (WIP enforcement action)

6.2 In February 2003, a DLO found a house being built without authorization. The frame had been erected but not yet the internal partitions and piping. DLO rejected the owner's retrospective application for C of Es and referred the case to BD. BD inspected and issued cease works warning. Between February to September, BD reviewed its position on redevelopment of small houses following meetings with HYK over a WIP case (Case 7, para. 6.9). When enforcement operations resumed in September, BD returned the case to DLO on the grounds that the house had already been completed at time of BD's first visit. DLO asked BD to reconsider the case by providing photographs to show that the house had no internal partitions or piping when it was first detected. BD maintained that in accordance with the 2001 working group's strategy (para. 4.6), it was to take priority action only on UBWs in progress. As the structure in question was no longer a WIP case, it was returned to Lands D for action. DLO subsequently recommended that Lands D HQ retrospectively grant C of Es to the owner subject to certain conditions. A decision

has yet to be reached as at June 2004, as the existing policy is normally not to grant C of Es retrospectively. Lands D HQ has to seek legal advice in view of the implications on future cases.

Case 2 (WIP enforcement action)

6.3 A DLO referred a WIP to BD within five days of detection. 12 days later, BD returned the case to DLO, stating that the UBW had been completed at the time of its consultant's investigative visit and is no longer a WIP item. DLO presented photographs showing that air-conditioners and window panes had not yet been installed. BD again maintained that its decision was based on the 2001 working group's strategy.

Case 3 (Owner attitude)

6.4 In August 2000, an NTEH was found to have multiple UBWs and the garden had encroached on Government land. DLO's attempt to survey the lot boundaries was frustrated by the owner. Legal advice was sought **thrice** to clarify DLO's right of entry into the premises for survey and inspection. The owner raised strong objection to DLO's warning letter issued in July 2002 and filed a complaint against DLO with this Office. A long series of correspondence and discussions took place. DLO gave the owner a final extension for the application of a short-term tenancy for the Government land occupied by the garden, subject to the purging of the UBWs in question. The UBWs were finally purged in March 2003 and the short-term tenancy was granted.

Case 4 (Aborted re-entry action)

6.5 In 1997, a DLO issued a warning letter to the owner of a house under construction, being partitioned into self-contained units. In January 1998, the owner's application for a C of C was rejected, as DLO was unable to conduct compliance checks inside the premises. In early 1999, DLO observed that some units were occupied. It decided to take re-entry action, as the unauthorised partitioning of the house was a serious breach of the lease. In February, March, July and August 1999, DLO tried but still could not inspect the house. Finally, in August an occupant let DLO inspect his unit. DLO found that there were four units on every floor, each with its own entrance, toilet, electricity and water meter. Preparation for re-entry action was initiated. In December, DLO organised a meeting with the owner. The owner did not turn up and postponed subsequent appointments scheduled between January and April 2001. DLO could only monitor developments by regular site inspections. A file note made in July 2001 pointed out that in view of the apathetic attitude of the owner, re-entry action resulting in eviction would only create hardship to the occupants. Between 2001 and 2003, the case was under periodic monitoring. In 2003, the case was discussed again and a decision was made to issue an advisory letter requesting the owners to rectify the breach. The owner did not respond. After registering an advisory letter in September 2003, DLO took no further action.

Case 5 (Recurrent breach)

6.6 In April 1999, a complaint alerted a DLO to an unauthorised rooftop canopy on an NTEH. No action was taken until August 2000, when DLO issued an advisory letter requiring the owner to purge the UBW within 28 days, failing which registration against the title would be made with the Land Registry. At a follow-up

inspection in September 2000, DLO found not only the UBW but also a prefabricated structure on the rooftop. Following a further letter in December 2000 requesting entry into the premises for inspection and measurement, the owner removed the rooftop canopy. DLO sought legal advice and confirmed that the prefabricated structure was in breach of the lease conditions. In May 2001, the owner complained against DLO to a Legislative Council Member. The latter pointed out that similar prefabricated structures were common in NT, causing no obstruction or inconvenience to neighbours and had not been the target of any large-scale demolition operation. However, DLO's explanation of its lease enforcement policy was accepted. In September 2001, the structure was removed. DLO informed the owner that should there be further breach of the lease conditions, re-entry action would be taken without further notice. At a follow-up inspection in April 2002, an enclosed rooftop canopy was found again. However, DLO could not enter the premises for inspection. In September 2002, the case was filed away.

Case 6 (Re-entry – owner attitude and prolonged action)

6.7 In early 1999, a small house was redeveloped without authorization. In addition, it had a large extension on the ground floor, an over-sized canopy, oversized balconies and stair hood, as well as a swimming pool constructed on agricultural land. Despite warnings from DLO, the owner Mr. X completed the extension works and the swimming pool. In mid-1999, DLO decided to take re-entry action and issued the first and second warnings under the re-entry procedures in December 1999 and February 2000. A report by the lease enforcement team in May 2000 indicated that Mr. X was a village representative and had consistently disregarded lease enforcement. When the final notice of Government's re-entry action was posted on site in July 2000, Mr. X claimed ignorance, requested more time to clear the structures and agreed to pay the forbearance fee (para. 4.14). However,

the breach was not purged and the fee not paid. In February 2001, after registering the instruments of re-entry, Government resumed ownership of the land. Although notified, Mr. X did not appeal for relief from re-entry within the six-month period or vacate the premises despite DLO's repeated warnings. In early 2002, expressing concern that eviction of Mr. X and demolition of the unauthorised structures would result in confrontation and invite criticism from the rural community, DLO sought legal advice several times, hoping to seek an eviction order from the court. After several rounds of correspondence, the Department of Justice pointed out that DLO should first try to take possession of the land under section 6[7] of the Land (Miscellaneous Provisions) Ordinance, Cap. 28.

6.8 In April 2003, in response to an enquiry from SHPL, Lands D HQ instructed DLO to prepare a detailed action plan. Then, Lands D instructed that if a solution could not be worked out with Mr. X within a short time, DLO should proceed with re-entry of the land (and property). In June 2003, upon DLO's invitation, Mr. X applied to extend the appeal period and undertook to carry out the necessary works. Subsequently, unable to contact Mr. X, DLO locked up the gate to the land in late October. Mr. X surfaced and requested more time to demolish the UBWs. DLO agreed to extend the grace period to January 2004 for the clearance of the most blatant UBWs and to tolerate the rest subject to the payment of forbearance fee. Mr. X demolished part of the UBWs. The case has not yet closed.

Case 7 (Villagers' lack of understanding)

6.9 In 2002, BD action on [illegible]Ps in an unauthorised development in a village met with objections from villagers who had no prior notice of the enhanced

[7] Section 6 provides Lands D with the authority to remove illegal occupants from Government land and take possession of the property or structure on the land.

action by BD. Concerned, HYK raised the issue with BD and Lands D. Two meetings were held in January and March 2003, where BD and Lands D explained their enforcement policies and priorities. Meanwhile, enforcement action was suspended as BD reviewed its position. WIP operations on such developments resumed in September 2003.

Case 8 (Interests of potential buyers)

6.10 While taking action under a lease enforcement programme in early 2001, a DLO found extensive UBWs in a property including a large extension into Government land, enclosed balconies and a rooftop canopy. Despite DLO's warning in May 2001, the owner took no action. While registering the advisory letter in October 2001, DLO learned that ownership of the house had changed in July 2001. Faced with DLO's warnings and a huge demolition charge, the new owner complained to this Office against Lands D for not having taken early action to register the advisory letter with the Land Registry. The new owner also instigated legal action against the ex-owner for not having revealed the presence of UBWs and Lands D's actions prior to the transaction.

6.11 This Office observed that given the registration process, there had been no unreasonable delay on the part of DLO. Lands D was advised, however, to explore means to speed up the process. As a result, Lands D issued instructions to DLOs that in straightforward cases, registration of the advisory letter should be effected within six weeks after expiry of the 28-day period for rectification.

7

OBSERVATIONS AND OPINIONS

NTEH POLICIES

7.1 Government's policy on NTEHs or "small houses" was established long ago and last revised in 1972. There have been substantial changes in Hong Kong's demography, infrastructure, housing standards and community expectations in the subsequent years. NT has evolved correspondingly to urbanized new towns with major housing developments, well served by road networks and transport systems.

7.2 The considerations over 30 years ago, that it was necessary to "encourage (villagers to build) more permanent houses with better sanitary standard" and that the relaxation measures "would not lead to much increase in the rate of buildings" (**Annex 1**), are no longer valid. The construction of new NTEHs are subject to more stringent control, transactions of NTEHs are active and many of them are no longer occupied by indigenous villagers but for sale in the property market. As the gap between construction standards for urban buildings and village-type houses narrows, it raises the question whether exemption should continue to apply. In this connection, we note that SHPL has been conducting a review on the policy

since 1995, and Legislative Council Members have been asking for the outcome of the review. We consider that this aspect of the policy should be examined and the review in general expedited.

CAUSES FOR CONCERN

7.3 UBWs in NTEHs are a difficult problem given the limited resources and low priority for action. The problem is to some extent associated with the complex issues of villagers' rights and local politics. In this context, Government's focus in enforcement is placed on building safety. Meanwhile, since our last direct investigation in 1996, the situation has deteriorated. We recognise that Lands D's resource constraints have made firmer enforcement difficult but the continued proliferation will simply allow the problem to get out of control. Many UBWs have in fact existed for decades without Government interference. Prolonged inadequate enforcement has led owners and offenders to disregard regulation and disrespect the authorities. In these circumstances, the law might well be viewed as, and eventually become, a dead letter.

7.4 Lands D's mode of enforcement is a cause for concern. Much time and resources are put into "lead up" preparations, such as repeated site inspections, multiple requests for entry and for legal advice. However, Lands D often backtracks when it is time to act, in face of problems and difficulties, e.g. uncooperative owners. We appreciate the serious implications of re-entry action and agree that such action should be taken only as a last resort. However, when the situation calls for such tough measures, the department should firmly exercise its powers and take enforcement action to completion. Not carrying through to the end will call into question its credibility as the enforcement authority.

THE STRATEGY

7.5 Given the history of the problem and the resource constraints, the 2001 working group's focus on tackling new UBWs (WIPs) and blatant breach is a step in the right direction. However, the strategy has not addressed the fundamental issues of lack of resources, unauthorised developments in NT, the limitations and viability of lease enforcement actions and the public's misguided perception of Government's virtually blanket toleration of UBWs in NTEHs.

7.6 Under the April 2001 enforcement policy (para. 4.3), Government has given extra resources to step up action against UBWs in the urban areas and set clear targets for enforcement within a set time frame.[8] This policy and its implementation strategy underwent extensive consultation, has been widely publicized and is positively pursued. This offers useful reference for Lands D in grappling with UBWs in NTEHs. There is, therefore, a case for HPLB to consider with Lands D and BD revamping the current enforcement strategy on UBWs in NTEHs and setting realistic targets for promulgation and proceeding with steadfast determination.

EFFECTIVENESS OF ENFORCEMENT MEASURES

BD's WIP Operations

7.7 BD has been making slow progress in coping with NT UBWs, with operations temporarily suspended in 2003 (Case 7, para. 6.9). In the past two and a

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[8] Under the 2001 enforcement policy, BD aimed to clear 150,000-300,000 UBWs within 5-7 years.

half years, 108 removal orders were issued, with 21 orders complied with (a success rate of about 20%), and 13 cases prosecuted under the Buildings Ordinance. There are still close to 150 cases pending action. While BD's WIP operations have managed to raise the rural community's awareness of enforcement, they have yet to achieve a deterrent effect.

7.8 BD's enforcement against UBWs in the urban area gives high priority to tackling "new" UBWs, i.e. those built within 12 months before the date of detection. It is therefore, a contradiction for BD to apply a different definition and to return cases of new UBWs in NTEHs to Lands D (Cases 1 and 2 - paras. 6.2-6.3). As neither BD nor Lands D has taken follow-up action on these cases, the deterrent effect on new UBWs is in doubt.

Lands D's Lease Enforcement Action

7.9 Lands D's enforcement measures (para. 4.6) have limitations. Re-entry action (para. 4.14), the **ultimate** punishment, should have the desired deterrent effect on owners. However, the process is costly, labour-intensive and time-consuming: reasonably, it is taken only as a last resort. Toleration of minor breach cases while charging a penalty premium (para. 4.17) is a pragmatic approach but it is not applicable to most UBWs and so its impact in reducing the problem is minimal. Demolition (para. 4.19) is an effective measure, as sensible owners would think twice before embarking on an abortive adventure. However DLOs' resource constraints and concern over possible confrontation have restricted its usage.

7.10 The commonest action taken by DLOs under lease enforcement programmes is registration of advisory letters (para 4.20). However, it only serves to alert prospective buyers to the existence of UBWs. Owners who do not wish to sell

their properties would not be deterred. Worse, as the word gets around that follow-up action is rarely taken after registration (para. 4.23), the readiness of owners to purge their UBWs is bound to decline even further. Success rate has dropped from 83.5% in 2000 to a mere 21.5% in 2003 (para. 4.22).

INEFFICIENCIES OBSERVED

Resources Constraints

7.11 Staff shortage is always a problem for enforcement. We acknowledge that it may be optimistic to expect much additional resources at a time of financial stringency. However, we believe that UBWs in NTEHs should be checked. Hence the need for more efficient utilisation of resources. Much of DLOs' resources for lease enforcement is presently wasted on repeated site inspections, multiple request for legal advice (sometimes more than once), requests for entry for measurements, etc. When faced with uncooperative owners, deadlines for action are deferred, leading to further monitoring and inspections, which may not always yield results. We consider that Lands D should revise work processes and procedures to optimise use of its limited resources. If necessary, the authorities should consider re-deployment of resources for this priority.

Guidance for and Monitoring of DLOs

7.12 Lands D HQ provides general guidance, but DLOs are left to decide on their own enforcement action. This is a somewhat laissez-faire approach to monitoring DLOs' work and has resulted in inconsistency of practices within the Department (para.5.11). For example, a UBW in Sai Kung may be subject to

re-entry action whereas a Yuen Long owner in a similar situation may only receive an advisory letter registered against his title. Lands D HQ should be concerned over such discrepancies as these could lead to accusations of unfair treatment from owners. Instead, it has allowed such unsatisfactory situations to continue (Cases 4 and 6, para. 6.5 and 6.7).

7.13 In their day-to-day work, front-line officers often encountered problems that they could not readily resolve (para. 5.4) and face difficulties particularly in cases of re-entry (Case 6, para. 6.7). Lands D HQ should provide suitable guidance and support to facilitate their work.

Cooperation between BD and Lands D

7.14 These two departments interpret a number of issues on WIPs differently (Cases 1 and 2, para. 6.2 and 6.3). BD considers its involvement to be confined to WIPs as NTEHs are Lands D's responsibility. Lands D staff, however, feel that enforcement action would be more expedient and efficient if taken under the Buildings Ordinance, especially where the UBW has rendered the house under construction outside the parameters of NTEHs. BD's view of WIP clearly differs from that of DLOs. As it is, BD and Lands D have given the public the impression that the two departments tend to pass the buck. This divergence of definition should be resolved, say in the 2001 working group.

7.15 We understand that each department has its own policies and priorities, but there should be cooperation and concerted effort for issues of common interest. This is particularly important as the public perceives the Government as a corporate whole. HPLB should reinforce its role as mentor, coordinator and monitor.

PUBLICITY AND OWNER ATTITUDE

7.16 We note that many owners take advantage of Lands D's tolerant attitude. Various delaying tactics are used (e.g. complaining, ignoring warnings, refusing entry and inspection - Cases 3, 4 and 5 - para. 6.4 to 6.6). In the case of four or five-storey unauthorised developments, some villagers might genuinely believe they could redevelop their houses without "interference" from the authorities. The "performance" of BD and Lands D could only reinforce this misconception. This must be corrected. We see a need to inform the public of Lands D's enforcement responsibility over unauthorised developments and UBWs in NTEHs in general. Firm and consistent enforcement action should follow to demonstrate to the community that Government means business.

INCORRECT RECORDS

7.17 We note that missing records, unclear lot boundaries or houses built off site (para. 5.6) hamper enforcement action. We realise that a full-scale exercise to re-align the boundaries and put the records straight would be difficult and costly. Moreover, the impact on sitting owners and occupants can never be resolved satisfactorily. Hence, we accept the current practice of dealing with such cases on an *ad hoc* basis as reasonable.

OTHER ACTIONS

Rates Exemption

7.18 Rates exemption is subject to the condition that the house in question is UBW-free. This helps to contain the problem. The self-declaration system is pragmatic but to be truly effective, the random checks need to be more rigorous and extensive; and irregularities firmly followed up (para. 4.25-4.26).

Protection for Potential Buyers

7.19 Sometimes, new owners pay a high price for purging existing UBWs in the houses they buy (Case 8, para. 6.10). Currently, estate agents in handling residential property sales are required to complete and provide a statutory Property Information Form[9] to the potential purchaser at the time of property inspection. The form requires the vendor to state any registered encumbrances on the property, e.g. removal orders from BD as well as information on any additions and alterations to the property known to him/her. A copy of the land search should also be attached to the form. This gives the potential buyer due assurance and protection. However, the law does not provide for penalties if the owner withholds the necessary information. If problems surface after transaction (Case 8, para.6.10), the apparent remedy for the new owner is to claim through civil litigation. Prospective NTEH buyers should be more clearly alerted to the risk of UBWs. Lands D's pamphlet on the purchase of village houses (para. 2.8) should be more extensively publicised to raise potential purchasers' awareness of such risk.

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[9] Form 1 prescribed under the regulations of Estate Agents Ordinance, Cap 511.

8

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

8.1 Proliferation of UBWs in NTEHs is the result of ineffective enforcement over decades. Lands D's lease enforcement actions are labour-intensive, and time-consuming, often complicated by controversy and objections from owners/villagers. Given this widespread problem and the limited resources available for enforcement, it would be unrealistic to expect the problem to be eliminated in the foreseeable future. The 2001 working group's focus on tackling new and dangerous UBWs in NTEHs is a step in the right direction but it needs to be far more comprehensive.

8.2 Strategies and measures should, therefore, aim for containment of the problem and stop further proliferation. In this context, two approaches should be taken:

- **rationalisation** of existing UBWs that are safe, not serious and "tolerable" and,
- **rigorous enforcement** with re-entry as the very last resort.

There should be consistent application across districts and wide publicity for public awareness.

RECOMMENDATIONS

8.3 Accordingly, The Ombudsman makes the following recommendations:

Overall Directions for the Longer Term

HPLB

(a) To review the current enforcement strategy and develop a realistic enforcement policy for containment of UBWs in NTEHs and stop its proliferation, taking reference from the strategy for tackling UBWs in the urban area (paras. 7.5 -7.6);

(b) To explore the feasibility of rationalisation of existing UBWs that are safe, not serious and therefore tolerable, subject to payment of a penalty. This is an extension of the concept of "penalty premium";

(c) To assess and monitor the situation regarding UBWs in NTEHs through the regular use of aerial photographs;

(d) To publicise widely such revised strategy for public awareness and proper understanding;

Improvement on Current Strategy in the Interim

The 2001 Working group

(e) To review the progress made under the current strategy and step up action against non-compliance with removal orders through prosecution (para.7.7);

(f) To explore the feasibility of expanding the current WIP operations to cover new UBWs (para. 7.8);

(g) To reconcile any differences in definitions and opinions between Lands D and BD and clarify their roles and responsibilities (para.7.14-7.15);

(h) Both departments to explore the possibility of establishing a joint Lands D and BD team to tackle WIPs and new UBWs in NTEHs. BD, with its new initiative for patrols to detect WIPs in NT, to provide a one-step service for more efficient enforcement against WIPs; Lands D to assist by prompt provision of relevant data;

(i) To develop a plan to tackle existing unauthorised four or five-storey houses to stop this violation of the law (para. 5.7);

(j) To enlist HYK's assistance in explaining and disseminating

the Government stand to villagers, followed by firm and persistent enforcement action to deter further offence (para. 7.16);

Lease Enforcement

Lands D

(k) To review the current enforcement mechanism to eliminate inefficiencies identified in this report (para.7.9 to para.7.13). To establish objectives and targets of achievement for DLOs (e.g. number of UBWs to be cleared within a specified time frame) and regularly appraise their performance;

(l) To simplify work processes and streamline procedures, redeploying staff where appropriate, to optimise the use of limited resources (para. 7.11);

(m) To closely monitor enforcement action to ensure due completion, including re-entry where necessary (Cases 4 and 6, paras. 6.5 and 6.7) and to suspend action only on good grounds;

(n) To develop a plan for action against owners not purging UBWs after registration of an advisory letter (para. 7.10) and those repeatedly breaching lease conditions (para.5.10) and to recover for the costs for administration;

(o) To train and guide front-line staff to instill greater confidence in exercising authority, e.g. gaining entry into premises for inspection, dealing with confrontation and handling uncooperative owners (Cases 4 and 6, para 6.5 and 6.7);

(p) To review the inconsistent practices among DLOs/NT and standardise their work processes and practices in lease enforcement (para.5.11 and 7.12) as far as possible, given local differences;

(q) To alert potential NTEH buyers to the risk of UBWs by widely publicising the Department's pamphlet on the purchase of village houses (para. 7.19) and publicity media;

Rates Exemption

HAD

(r) To extend the coverage of random checks and to work out a system with Lands D whereby DLOs/NT conduct a matching check on ownership of detected UBWs to see if any of such owners are enjoying rates exemption and report findings to HAD for action (para. 7.18).

9

FINAL REMARKS

MAJOR COMMENTS RECEIVED

9.1 HPLB, Lands D, BD and HAD have commented on our draft report and updated statistics. We have, where appropriate, incorporated their suggestions for textual amendments into this report. Their major comments are set out below.

HPLB

9.2 HPLB agrees with the conclusion of the report and accepts our recommendations. It advises that the working group under its leadership will meet to follow up these recommendations and study possible options to achieve and enhance its enforcement objective, taking account of the administrative, legal, financial and social implications which can be substantial.

BD

9.3 BD agrees with our observations and the conclusion that improvement should be made to enforcement action aiming for containment of UBWs in NTEHs. It also accepts the recommendations in the report and will be working with HPLB and Lands D to review the current enforcement strategy. BD considers that by stepping

up surveillance and detection of WIP cases, the problem of UBWs can be tackled at source and not develop into a situation where enforcement becomes more difficult.

LANDS D

9.4 Lands D generally agrees to our recommendations and says that it will work on them.

9.5 On our observation that no further action is taken after the registration of advisory letters (para. 7.10), Lands D comments that the intention of registration is to make the property concerned less attractive to potential purchasers, rather than to follow up with demolition action as that would be manpower-consuming and fraught with political, technical and legal implications. On the other hand, Lands D appreciates the adverse effect of not following up advisory letters and sees the need to strike a balance.

HAD

9.6 HAD accepts our recommendation in paragraph 8.2 (r) and will work with Lands D to set up a system for enhanced detection of non-compliance cases.

FINAL REMARKS FROM THE OMBUDSMAN

9.7 The Ombudsman welcomes the positive response of the Bureau and the Departments and notes that follow-up action on our recommendations will commence shortly. Given the magnitude and complexity of the problem, we realise that there is no instant panacea. However, with determination and

cooperation, it should be possible to contain the problem. It is noteworthy that with the increasing urbanisation of NT and rise of tower blocks with proper management, the problem should be a diminishing one.

9.8 As regards Lands D's explanation for not taking follow-up action on registered advisory letters (para. 9.5), we note that the Lands Instructions describe registration as an ***interim*** measure, which implies further action in future. Some of the advisory letters also contain a forecast of further action if the breach is not corrected. Lands D HQ have addressed DLO/Yuen Long on the need to follow up on registered letters (para. 5.9). These are healthy signs of Lands D's intention for further action. The Ombudsman recognizes Lands D's difficulties in taking demolition action against instances of outstanding breach, but it would be unsatisfactory and unacceptable to leave matters as they are.

9.9 The Ombudsman maintains the stand at para. 7.10 and urges for early review of the current enforcement strategy. Overall, the proposed rationalisation scheme should help to reduce the caseload for Lands D enforcement.

9.10 The Ombudsman asks to be kept informed by HPLB, Lands D, BD and HAD of the progress of implementation of our recommendations.

9.11 The Ombudsman further notes that the Secretary for the Treasury has suggested a review of the adequacy of the existing legislation (para. 2.5), and trust that HPLB would seriously consider it.

9.12 Lastly, The Ombudsman wishes to express appreciation for the cooperation and assistance rendered by HPLB, Lands D, BD and HAD in the course of this investigation.

---- End ----

Office of The Ombudsman

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August 2004

ANNEXES

Annex 1
(Para.1.1)

INFORMATION ON NEW TERRITORIES EXEMPTED HOUSES AND UNAUTHORISED BUILDING WORKS

Land Lease

1. Land in Hong Kong is leased or otherwise held from Government. A land lease contains general and special conditions governing its usage (e.g. domestic or industrial) and obligations to be fulfilled by the grantee/lessee. Where appropriate, it also contains the development specifications of the building to be constructed thereon, e.g. roofed-over area, height and number of storeys. The Lands Department ("Lands D") has a duty to ensure that all terms in the lease are complied with and to take lease enforcement action against any violation.

Buildings Ordinance

2. Under the Buildings Ordinance ("BO"), Cap 123, prior approval of the Director of Buildings ("D of B"), acting as the Building Authority, is required for all building works. The BO requires the developer to appoint authorised persons (architects or surveyors), qualified professionals (e.g. engineers) and registered contractors for the submission of building plans and supervision of the construction process. Approval of the Building Authority is required for building plans, site formation, work commencement and occupation.[1] Any works that have no approval from the Building Authority are deemed unauthorised, and the Buildings Department ("BD") has an enforcement duty to clear these unauthorised building works under the BO.

Exemption from Buildings Ordinance and Features of an NTEH

3. In the New Territories ("NT"), a village-type house that meets the

specifications set out in the Buildings (Application to the New Territories) Ordinance ("BO (NT) O") may be exempted from the above requirements of the BO and is therefore regarded as a New Territories exempted house ("NTEH"). According to the specifications, the building should not contain more than three storeys nor exceed a height of 8.23 metres (27 feet), and the maximum roofed-over area should not exceed 65.03 square metres (700 square feet). NTEHs may be small houses allowed under the NT Small House Policy or redeveloped village-type houses.

Construction of an NTEH

4. For constructing an NTEH, a villager will have to apply for Certificates of Exemption[2] ("C of Es") from the District Lands Officer before construction commences. Since 1999, villagers are required to appoint a T2[3] competent person and a registered structural engineer to oversee construction works and to certify their compliance with Lands D's requirements. On completion of construction, the District Lands Officer will issue a Certificate of Compliance ("C of C") if he is satisfied that all the requirements have been complied with.

New Territories Small House Policy

5. NTEHs originate from Government's policy on villagers in NT. Historically, villagers were allowed to build houses for their own use on land held under government lease, free of premium, subject to certain restrictions on height, size and construction materials. When the BO was extended to NT in 1960, such houses with relatively simple design and construction process were exempted from the application of the Ordinance. In 1972, Government introduced the Small House Policy to encourage villagers to build more permanent houses with better sanitation standard. Under this policy, an indigenous villager[4] in NT can apply for permission to build for himself during his lifetime a small house on a suitable site within the environs of the village. Land granted under the policy is subject to the payment of a

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[1] Prescribed in sections 4,9,14,21,28 and 30 of BO.
[2] Certificates of Exemption for building works, for drainage works and for site formation.
[3] A person holding a higher diploma/certificate in relevant disciplines awarded by a recognized technical college, and with not less than three years' relevant working experience.
[4] A villager who is 18 years old and is descended from the male line from a resident in 1898 of a recognized village.

reduced premium and contain restrictions on the sale or disposal of the land. . The house can be built on private land, in which case a Building Licence will be issued; or on Government land where a private treaty grant will be given. The policy continues to exempt the construction of these houses from the provisions of the BO through the BO (NT) O, thus simplifying construction rules and reducing administrative costs. When the policy was first introduced in 1972, it was believed that these measures would not lead to much increase in the rate of buildings.

6. As at the end of December 2003, a total of 28,851 small house grants have been approved.

UBWs in NTEHs

7. Broadly speaking, unauthorised building works ("UBWs") are:

(a) building works, the construction of which do not have the approval or exemption granted by the D of B;

(b) structures that do not conform to the specifications prescribed in the BO (NT) O; or

(c) structures that exceed the limits imposed by the lease condition but without any approval for modification.

Departments Responsible

8. UBWs in NTEHs are in breach of lease conditions, and Lands D as Government's land administrator has primary responsibility for taking action against such non-compliance. In cases where Lands D is not in a position to take action (e.g. when the UBW is structurally unsafe), BD takes enforcement action under the BO instead. The Housing, Planning and Lands Bureau ("HPLB") is responsible for formulating policies, and overseeing and coordinating the work of the two departments.

Annex 2(a)
(Para. 2.1)

Recommendations of the 1996 Direct Investigation Report

1. The Administration should review the priority accorded to the enforcement against UBWs in NT in the light of circumstantial changes since 1975 to determine whether those UBWs in NT not yet acted upon should continue to be tolerated.

2. Lands D should review its procedures for submitting recommendations on lease enforcement against UBWs to the District Lands Officer or the District Lands Office Conference with a view to working out a uniform and consistent approach for all District Lands Offices ("DLOs").

3. Lands D should conduct a sampling survey to assess the magnitude and seriousness of the problem of UBWs in NTEHs in each district.

4. Based on the survey findings, Lands D and BD, in consultation with the Secretary for Planning, Environment and Lands, should formulate appropriate policies and procedures to tackle the problem.

5. Lands D and BD should then assess the resources required to effectively and efficiently carry out these policies and procedures.

6. Additional resources should be sought if the existing resources proved inadequate for enforcement against UBWs in NTEHs, including Government Contractors' actions.

7. Lands D should explore the feasibility of introducing an equitable penalty system, after consultation with relevant bodies in NT such as the District Boards ("DBs"), the Heung Yee Kuk ("HYK") and the Rural Committees ("RCs"). Lands D should also consult the Attorney General's Chambers on the need for corresponding legislative amendments.

8. Lands D should solicit the assistance of DBs, HYK and RCs in publicizing Government's position on UBWs in NTEHs.

9. Lands D should consistently apply the practice of registration of breaches against the property titles throughout the DLOs.

Annex 2(b)
(Para. 2.1)

Implementation of Recommendations

Recommendations	Status
1. Review the priority accorded to tackling UBWs in NTEHs	**Not implemented**
2. Review procedures for achieving consistency of practices among DLOs	**Implemented**
3. Conduct a survey to assess magnitude of problem	**Not implemented**
4. Based on survey findings to formulate policies and procedures to tackle the problem	**Not implemented but an internal working group formed in 2001 and short-term strategy mapped out.**
5. & 6. Assess and if necessary seek additional resources for effective implementation of any new policies and procedures formulated.	**Not implemented**
7. Consider the introduction of alternative measures.	**Not implemented**
8. Solicit the assistance of DBs, HYK and RCs in publicising Government's position on UBWs in NTEHs	**Partially implemented**
9. Consistently apply the practice of registration of breaches against property titles among DLOs	**Implemented**

Annex 3
(Para. 2.3)

Staffing in NT DLOs for Lease Enforcement

District	Lease Enforcement Team	Year (as at 1st April)	
		1996	2004
DLO/ Islands	SLE	3/10	1/5
	LE	1 1/4	½
	LI	31/4	1
DLO/ Kwai Tsing	SLE	1	1*
	LE	2	2*
	LI	6	4*
	* DLOs/Kwai Tsing and Tsuen Wan merged in 2004.		
DLO/ North	SLE	1/10	¼
	LE	1/5	1
	LI	2/5	3
DLO/ Sai Kung	SLE	1/3	1
	LE	1	2*
	LI	2	7*
	* Land teams redeployed to process lease enforcement cases		
DLO/ Sha Tin	SLE	1	½
	LE	2	1
	LI	4	2
DLO/ Tuen Mun	SLE	½	1
	LE	1	2
	LI	2	8
DLO/ Tai Po	SLE	½	½
	LE	1	1
	LI	2	2
DLO/ Tsuen Wan	SLE	½	-*
	LE	1	-*
	LI	2	-*
	* staffing included in DLO/Kwai Tsing.		
DLO/ Yuen Long	SLE	½	1*
	LE	1	2*
	LI	2	7*
	* Redeployment of staff to tackle backlog cases		

Key:

SLE	**- Senior Land Executive**
LE	**- Land Executive**
LI	**- Land Inspector**

Annex 4
(Para. 4.3)

Buildings Department – April 2001 Enforcement Policy Against UBWs

In view of the very large number of UBWs in Hong Kong, the Buildings Department takes immediate enforcement action against all new UBWs and other UBWs which pose an obvious hazard to life or property. Priority is given to the removal of the following –

(a) items constituting obvious or imminent danger to life or property;

(b) new items, irrespective of the date of completion of the building where they have been carried out;

(c) items in or on buildings, on podiums and rooftops, in yards and lanes (including unauthorised site formation works) constituting a serious hazard or a serious environmental nuisance, as determined by the Building Authority;

(d) major individual items;

(e) items in or on individual buildings with extensive unauthorised building works;

(f) items identified in buildings or groups of buildings targeted for large-scale operations or maintenance programmes; and

(g) unauthorised alterations to or works in environmentally friendly features of a building (eg balconies, sky or podium gardens) for which exemption from calculation of gross floor area has been granted by the Building Authority.

Other items will be recorded for review in due course.

Annex 5
(Para.4.5)

Order of Priority for Lease Enforcement Action

Under the policy endorsed by the Executive Council in December 1975, Lands D's order of priority for lease enforcement action in respect of buildings in both the urban areas and NT is as follows :

(a) dangerous or obnoxious industrial undertakings in residential buildings;

(b) dangerous or obnoxious industrial undertakings in existing or new non-industrial buildings other than permissible Ground Floor Trades and Service Trades;

(c) other industrial undertakings in new non-industrial buildings other than Service Trades;

(d) misuse of parking areas in industrial buildings;

(e) misuse of residential buildings (including parking areas) not falling under (a) or (c);

(f) misuse of non-industrial buildings (including parking areas) not falling under (b) or (d); and

(g) unauthorised additions to buildings, for example, breaches of site coverage, height, restrictions, plot ratio, etc.